(9)

FILED
APR 30 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY,
Petitioner,

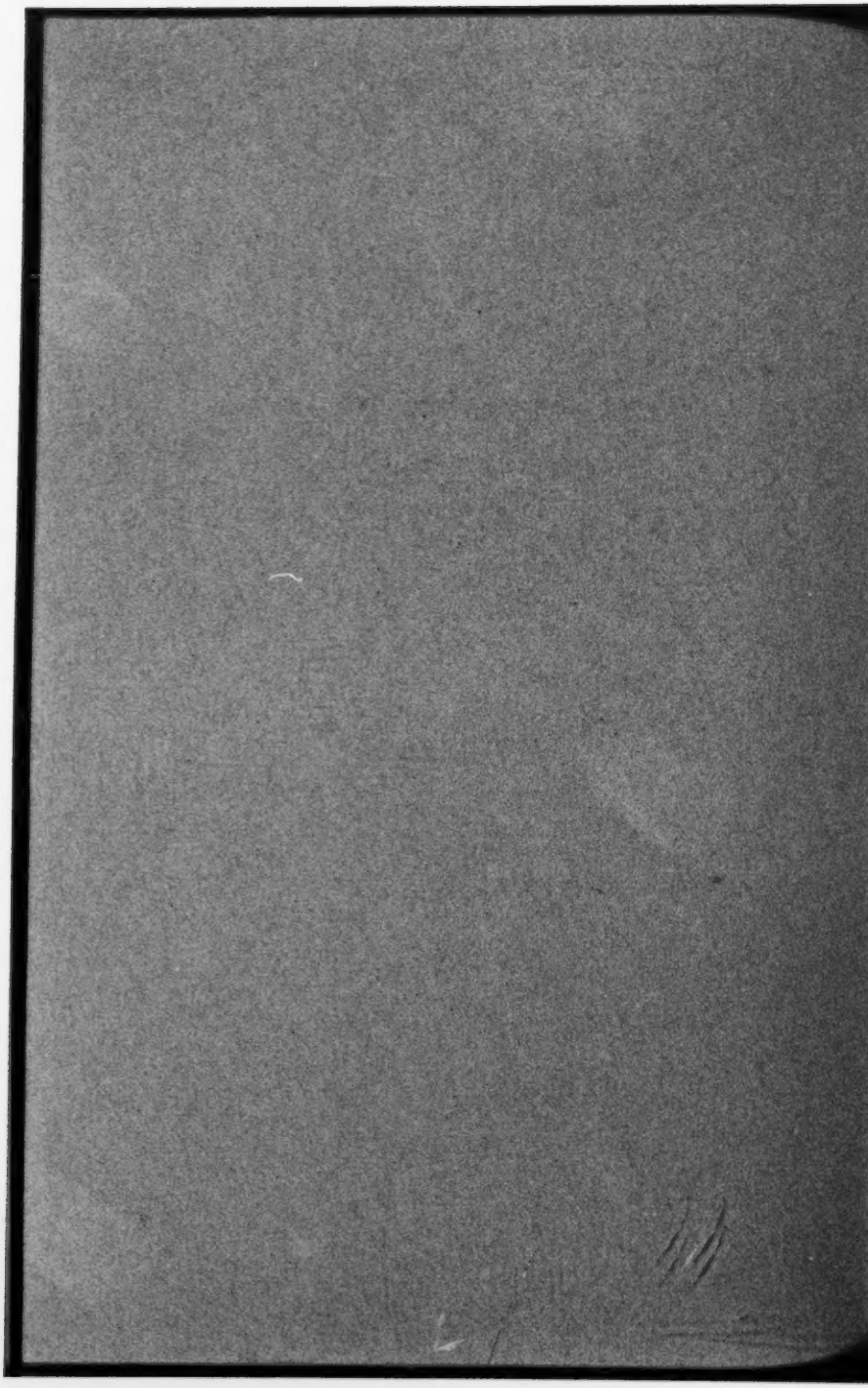
vs.

ARNOLD CONSTRUCTION COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

T. J. BLACKWELL,
Counsel for Petitioner.



INDEX.

Cases Cited.

	Page
Chicago Life Insurance Co. v. *Cherry,* 244 U. S. 25, 37 S. T. 494, 61 L. Ed. 966	2
Georgia R. & Electric Co. v. *Decatur,* 295 U. S. 165, 55 Sup. Ct. 701, 79 L. Ed. 1365	4
Roberts v. *City of New York,* 295 U. S. 264, 55 Sup. Ct. 689, 79 L. Ed. 1429	4, 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 819

FRANKLINVILLE REALTY COMPANY,
Petitioner,

vs.

ARNOLD CONSTRUCTION COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

Comes now the above named Petitioner, Franklinville Realty Company, and presents this its petition for a rehearing of the above entitled cause, and in support of its application for rehearing respectfully shows:

One of the principal questions involved is as to whether the petitioner has been accorded due process of law in the lower courts in disposing of a question as to whether fraudulent and collusive practices were indulged in between the architects and contractor.

On page 4 of the petition for writ of certiorari herein, it is shown that the District Judge, at the conclusion of the case (R. 2d, 687) ruled as follows:

> "I realize that defendant contends there was a lack of good faith on the part of Arnold Construction Company in the carrying out of the contract, and that the securing of the approval of work done through the issuance of architect's certificates was a *collusive proceeding* between Arnold Construction Company and the architect, but I think all of that has been decided by the Court of Appeals, *is not an open question,* and the District Court should not now go back through the contract and relitigate the alleged lack of good faith, and *retry* this issue. The District Court should consider whether the defendant has upset on this re-reference or rehearing the prima facie effect of the architect's certificates."

The District Judge was mistaken in the foregoing, for the reason that the Circuit Court of Appeals had not passed upon the question as to collusion, that question not having been tried and being actually open for consideration, as the petition for writ of certiorari unquestionably discloses.

However, it is believed that this Honorable Court, in denying the application of the petitioner herein, possibly considered the case of *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25, 37 S. Ct. 494, 61 L. Ed. 966, as in point and controlling, as that case has been referred to by the text writers as holding that "an erroneous decision that the issue of jurisdiction has been judicially heard and determined in prior proceedings" was a mere error of law, not coming within the due process guaranty, whereas this Court, in that case, held only that the claim that a money judgment by a state court violates due process for want of jurisdiction over the defendant's person is not sustainable if the jurisdiction was questioned by the defendant under a plea in abatement and by appeal in the state courts of review, and

sustained after *fair* hearings before the judgment became finally effective.

A rendition of a judgment (in Illinois) in favor of the plaintiff in an action upon a judgment of a court of another state (Tennessee), over the defendant's objection that the judgment sued upon was void for lack of valid service of process does not take the property of the defendant without due process of law, where the second (Illinois) judgment rests upon the view, right or wrong, that inasmuch as the issue of jurisdiction over the parties *was actually raised and adjudicated* after full hearing in the former (Tennessee) case, it could not be reopened in the second (Illinois) action. It was so held in the *Cherry* case, supra, for the reason (1) that the determination by the courts of Tennessee on a factual basis, under the plea in abatement, that the defendant had been served or had submitted to the jurisdiction of the court could at most have been an "erroneous decision", and (2) the Illinois court was not required, in a collateral attack upon the judgment, to re-examine the question. That case is distinguishable from the case at bar for the reason that the Tennessee court *did grant a hearing* and did fairly decide the question upon the law and evidence, *even though its decision might have been incorrect,* and the Illinois court was not required to go behind the decision of the trial and appellate courts of Tennessee. But here, the issue was not tried and it is not even contended by the respondent that it has been tried. The court has expressly declined to try it, or to consider the evidence, mistakenly, as the record discloses, and as the adversary party admits.

Petitioner believes that the *Cherry* case may be distinguished, further, from the case at bar on the basis that, there, an Illinois court was required to recognize the judgment of the Tennessee courts and to give it full faith and credit, under the Constitution, whereas in the case at bar no such situation exists.

Petitioner believes that the record clearly discloses not merely an erroneous decision of a court on matters within its jurisdiction, after the parties have been *fully* heard in the regular course of judicial proceedings, but a failure to hear and a refusal to decide. Petitioner believes that the District Court erroneously decided that the issue as to fraud and collusion had been disposed of at a prior hearing, when actually that issue had not been "fully heard in the regular course of judicial proceedings" and had, in fact, not been heard at all.

Having in mind that the determination of the question as to whether the requirements of the due process clause have been observed, regard must be had for substance rather than form; and also believing the effect of the guaranty to be the inhibition of the taking of one person's property and giving it to another, in a way or through means contrary to settled usages and modes of procedure; and assuming that the clause here under consideration is designed to afford the litigant an opportunity to know opposing evidence and to meet it with evidence according to the principles of fair judicial investigation, and to have the final determination granted on evidence and some reasonable view supporting it, petitioner humbly suggests that this Honorable Court has overlooked its ruling and decision in the case of *Georgia R. & Electric Co.* v. *Decatur,* 295 U. S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, *holding that a refusal to consider competent evidence is not mere error of law, but a denial of a full hearing under the constitutional guaranty,* and has inadvertently applied the rule that even an erroneous decision of a court on matters within its jurisdiction does not deprive the successful party of his rights under the guaranty, where the parties have been *fully heard* in the *regular course* of judicial proceedings.

On the basis above stated, this case may be readily distinguished from such cases as *Roberts* v. *City of New*

York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429, holding that the due process clause is not a guaranty that a trial shall be free from error, but, to constitute a taking of property without due process of law by force of a judgment, the error must be gross and obvious, regardless of the classification or characterization of the error dealt with in the present case.

The respondent's objections to the petition herein seem to have been based principally upon the theory that the District Court, at the second trial, was strictly and narrowly limited in regard to the question to be determined and as to the evidence admissible. As to this, the answer to the petition (page 7) contains the following:

> "When a case has been decided on appeal and remanded to the trial court, the latter has no authority without leave of the appellate court to retry the case or to enlarge the issues beyond the purpose for which it was remanded."

It seems to have been assumed that the Circuit Court of Appeals, in that behalf, necessarily observed the essential requirements of law, and that its judgment on the first appeal was entitled to verity. At least, it is suggested that inasmuch as the petitioner did not attack the judgment of the said appellate court by appeal or certiorari, any question as to whether the first judgment on appeal provided petitioner with due process of law was foreclosed. It is respectfully submitted, nevertheless, that the said judgment, remanding the cause to the District Court for further proceedings, was not a final judgment, and was not an adjudication, final in its nature, as to any matter distinct from the general subject of the litigation. Therefore, it is mentioned that the jurisdiction of this Court has been sought at the earliest time possible, for the purpose of obtaining a review not only of the judgment rendered by the Circuit Court of

Appeals on the second appeal, but also for the review of the judgment of that court on the first appeal. The two appellate judgments last mentioned are so related to each other as to be inseparable for review purposes.

For the foregoing reasons, the petitioner urges that the principal question ought to be reconsidered, and for the same reasons the questions numbered 1 to 4, inclusive, as set forth in the petition for writ of certiorari (pages 7 and 8) should also be reconsidered.

It is submitted that the Court may take judicial notice of the fact that at this time there is in progress an enormous amount of public construction work under so-called cost plus contracts. The question as to the extent to which contractees under such agreements may be required to respond to exorbitant and fraudulent demands is one of gravity and importance, which may be influenced by a decision of this case by this Court. In addition, important questions are presented as to the construction of the Rules of Civil Procedure in regard to the cross-examination of adverse parties and hostile witnesses that ought to be settled.

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that the application for a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause, be, upon further consideration, granted as petitioned for.

Respectfully submitted,

T. J. BLACKWELL,
Counsel for Petitioner.

T. J. BLACKWELL,
BLACKWELL & WALKER,
First Federal Building,
Miami, Florida.

Certificate of Counsel.

I, T. J. Blackwell, counsel for the above named petitioner, hereby certify that the foregoing petition for rehearing is being filed in good faith, and not for purpose of delay.

T. J. BLACKWELL,
Counsel for Petitioner.

(5871)